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In The

Supreme Court of the United States

October Term 1999

Bobby W. Kennedy, Pro Se

Petitioner,

vs.

Daniel S. Goldin, Administration, National Aeronautics and Space Administration ; Ben L. Erdreich, Chairman, United States Merit Systems Protection Board, et al.

Respondant

Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1) Does the U.S. District Court Judge have the right to sanction, deny, and dismiss this lawsuit by entering into a conspiracy with the U.S. Justice Department and government agency to deny the appellant the right to file a lawsuit in U.S. District Court when the appellant has been discriminated against in job selection of seven (7) new, never tried, different job announcement positions which he filed for in this lawsuit and was denied because of discrimination, age, handicap, and retaliation for filing EEO complaints and lawsuits on previous discrimination complaints and now being denied over 100 positions the appellant filed for , whistleblowing complaints on worker safety and denied workman's compensation claims when ;the defendant and the U.S. Justice Department does not want to answer criminal, wrongful, conspiracy, obstruction of justice, fraud, abuse of authority when the appellant has a court deposition of the forth level manager from the agency center over the appellant , when he admits that the appellant has a black mark against him for filing EEO complaints afforded him under the Constitution of the United States when the appellant's same type lawsuits filed earlier have been allowed to proceed in the same district court ? The appellant has been denied access to the court in this Eleventh Circuit while the other circuits have allowed the same type cases to be heard.

PARTIES TO THE PROCEEDING

Bobby W. Kennedy was the Plaintiff in the lower court proceedings and the appellant before the United States Court of Appeals for the Eleventh Circuit.

Daniel S. Goldin. By regulation he has been named as the respondent and the Defendant in the case before the lower court proceedings of this case and was the appellee before the United States Court of Appeals for the Eleventh Circuit.

Ben L. Encreich is the Chairman of the U.S. Merit Systems Protection Board, et al. and was the Defendant in the case before the lower court proceedings of this case and was the appellee before the United States Court of Appeals for the Eleventh Circuit.

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BOBBY W. KENNEDY

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DANIEL S. GOLDIN, ADMINISTRATOR FOR THE NATIONAL AERONAUTICS AND SPACE ADMINISTRATION, BEN L. ENCREICH, CHAIRMAN, U.S. MERIT SYSTEMS PROTECTION BOARD, et al.

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Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR A WRIT OF CERTIORARI

OPINIONS BELOW

On June 10, 1999 the United States Court of Appeals for the Eleventh Circuit issued its opinion, affirming the decision of the District Court. That opinion was nonpublished.

JURISDICTION

The Circuit Court rendered its opinion in this case on June 10, 1999. This opinion was not published. Petitioner moved for a petition for rehearing and a petition En Banc and was denied on August 26, 1999.This is the judgment sought to be reviewed. The mandate was issued Sep 13, 1999. This court has jurisdiction to review the judgment of the United States Court of Appeals for the Eleventh Circuit by Writ of Certiorari pursuant to 28 U.S.C. 1291 1254(1).

STATUTES INVOLVED

The Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. S 601, et. seq. ("ADEA"), also U.S.C. 621 and 633 (a) et seq; The Rehabilitation Act of 1973, 29 U.S.C. S 794; Handicap discrimination 29 U.S.C. Section 791, Race and Sex Discrimination 42 U.S.C. S 2000, EEO Reprisal and Retaliation under Title VII, Civil Rights act of 1991, 703 to Title VII, 42 U.S.C. 2000 (e)(3), and 2000(e) 16 (c) and 2000(e)(2) Retaliation Employment Discrimination; Title VII 42 U.S.C. S 2000(e)(2); Sex and Race Discrimination and the Whistleblower Protectin Act, 5 U.S.C. 2302 (b)(8). Handicap 501, 503, and 504 Rehabiliation Act 1973; Fourth, Fifth, and Fourteenth Amendments and any other amendments where the appellant's rights and due process have been violated

to the Constitution of the United States. 28 U.S.C. Section 1346 et.seq., under Title VII, Civil Rights Act of 1991, Constitutional Torts . Breach of Contract Claim

STATEMENT OF THE CASE

This action was filed in the United States District Court for the Northern District of Alabama, Middle Division, on 12-3-97 seeking remedies under the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. S 601, et seq. ("ADEA"), also U.S.C. 621 and 633(a) et seq.; The Rehabilitation Act of 1973, 29 U.S.C. S 794; Handicap Discrimination 29 U.S.C. Section 791, Race and Sex Discrimination 42 U.S.C. s 2000, EEO Reprisal and Retaliation under Title VII, Civil Rights Act of 1991, 703 to Title VII, 42 U.S.C. 2000(e)(3), and 2000(e)16(c) and 2000(e)(2) Retaliation Employment Discrimination; Title VII, 42 U.S.C. S 2000(e)(2); Sex and Race Discrimination and the Whistleblower Protection Act, 5 U.S.C. 2302(b)(8), Handicap 501, 503, 504, Rehabilitation Act 1973; Fourth, Fifth, and Fourteenth Amendments to the Constitution of the United States, 28 U.S.C. Section 1346 et. seq. under Title VII, Civil Rights Act of 1991.

Statement of the Facts

This case involves dismissal of a ligitimate discrimination complaint . This new case was the result of a new cause of action on new job

discrimination complaints . This case met all of the requirements of a new Novo litigated of job denial discrimination case that was proper before the District Court. The same type job discrimination cases have been before the District Court and the court has allowed them to move through the court as the law allows and one of the appellant's cases CV-95-S-3323-M is now before the District Court under a new judge. Another case, David Nicolas vs Daniel Goldin, CV-97-c-1842-NE, which was like the appellant's case, was allowed to move through the district court. The district court is using a double standard in the way this appellant has been treated. The agency and Justice Department misled the court to have this case dismissed by saying these cases had been tried before which was not true. This case grew out of a new cause of action that had not been tried before in the district court.

Undisputed Fact

1. The Petitioner has been employed by the National Aeronautics and Space Administration ("NASA") since October of 1960.

2. The Petitioner is a white male, born on September 27, 1936, now 63 years of age.

3. At the time this action was filed the petitioner at NASA, was an AST Electronics of Materials Engineer.

Petitioner's Position

Petitioner, Bobby W. Kennedy claims the U.S. District Court erred in its decision to dismiss with prejudice the appellant's civil action under numerous

federal and state laws. The appellant also appeals the imposition of sanctions and denial of his Motion to Reconsideration. The appellant obeyed the court order to the best of his Pro Se ability by using previous complaints as a guide in preparing the new cause of action that resulted in a completely new set of job discrimination claims that arose out of new job positions that he was denied that he applied under the agency competitive placement plan . The same District Court judge, Lynnwood Smith, had approved and accepted other complaints that were written in the same style and format, namely Bobby Kennedy vs. Daniel Goldin, CV-95-S-3323-M , and Bobby Kennedy vs. Daniel Goldin, CV-94-N-0016-N accepted by U.S. District Court Judge Byron Nelson.

The appellant argues that he had complied with the court using precedent set standard of previous cases he had had accepted by the same district court. The appellant had omitted in his amended complaint and clarified other allegations that were new and arose from a new cause of action added to the already new cause of action (new job positions that resulted from new, never announced positions that he applied for under the agency's Competitive Placement Plan).

The District Court erred in applying Rule 11 sanctions over the Merit System Protection board claims because they contained discriminatin claims. The District Court has jurisdiction over the MSPB claims. The Pro Se appellant was issued instructions by the United States Court of Appeals for the

Federal Circuit that states that this court does not have jurisdiction to review Merit System Protection cases that have claims of discrimination and "you must proceed in a district court."

The court cannot rule the appellant out of its Honorable court when the U.S. Court of Appeals for the Federal circuit will not accept the appellant's case. The appellant also believes that the district court should have reconsidered its order pursuant to Fed. R.Cir P.5(e).

Petitioner, Bobby W. Kennedy, appealed the U.S. District Court's dismissal to the U.S. Court of Appeals for the Eleventh Circuit with prejudice of his civil action under numerous federal and state laws. The appellant asked for a Suggestion for Rehearing Hearing En Banc decision of the Appeal Court's decision to affirm the District Court's dismissal of ligitimate discrimination complaints. The dismissal was an error of the U.S. District Court which it based upon the appellant's failure to obey a court order. The appellant obeyed the court to the best of his ability and chanted the complaint to satisfy the court leaving new discrimination complaints in the complaint which the appellant had the constitutional right under the Constitution to do. The petitioner , Pro Se, also appealed the imposition of sanctions and denial of his Motion for Reconsideration.

The petitioner argued that he complied with court orders by omitting previously adjudicated claims from his complaint, and by making more

specific allegations. He challenged the court's imposition of Rule 11 sanctions, contending that the court's decision not to exercise jurisdiction over his Merit Systems Protection Board claims was erroneous because they included discrimination claims which the U.S. Court of Appeals for the Federal Circuit directed him to file in U.S. District Court. Finally, he argued that the court should have reconsidered its order pursuant to Fed.R.Civ.P.59(e).

The appellant court erred in reviewing the application of res judicata on a do novo basis because all of the discrimination claims were from a new cause of action of discrimination and had nothing to do with previous litigation. Res judicata does not apply with the new job discriminations. The Appeals Court's decision on the dismissal of the action Rule 41(b) for failure to comply with court orders was reviewed by the Appeal's Court only for abuse of discretion which disallowed ligitimate new discrimination claims on a new cause of action and the appellant is entitled to have these complaints redress in the Honorable U.S. District Court and asked the Appeals Court judges to allow these complaints to go forward in remanding the new job discrimination complaints by the U.S. District Court for a jury trail.

The appellant stated that the Court uses the same standard to review the imposition of rule 11 sanctions. The appellant did not question the Appeals Court standard to review, only that a Pro Se litigant had struggled to comply with the court's

desire and have his complaints redress in a court of law and had done the best he could do with the complaints. The appellant can conduct plenary review of subject matter jurisdiction Sua sponte, and have an obligation to inquire into subject matter jurisdiction whenever it may be lacking; however, in this case the petitioner had new ligitimate discrimination complaints that he had a constitutional right to have redress and he had been denied that right. If the Appeals Court reviews a denial of a motion under Rule 59(e) only for abuse of discretion, where does the appellant turn to have ligitimate discrimination complaints redress ?

The appellant obeyed the district court to the best of his ability believing that the style that had been accepted by the same district court Judge Lynnwood Smith was acceptable. The appellant made the discrimination allegations in the second amended complaint following previous complaint written style and outlines used in earlier complaints, CV-94-N-0016-M and CV-95-S-3323-M, as a guide in preparing complaint CV-94-S-3118-M believing he was explaining to the district judge that had approved the same style pleadings before and allowed them to move through the court. This new case ,CV-97-S-3118-M was the result of a new cause of action on new job discrimination complaints and had nothing to do with complaints in the earlier cases CV-94-N-0016-M and CV-95-S-3323-M which were used to show background patterns and practice of discrimination that continues today. The district court judge and the agency and the Justice

Department conspired against the appellant to dismiss claims that they did not want to answer in this action in a court of law.

ARGUMENT

1. Does the U.S. District Court Judge have the right to sanction, deny, and dismiss this lawsuit by entering into a conspiracy with the U.S. Justice Department and government agency to deny the appellant the right to file a lawsuit in U.S. District court when the appellant has been discriminated against in job selection of seven (7) new, never tried, different job announcement positions which he filed for in this lawsuit and was denied because of discrimination on age, handicap, and retaliation for filing EEO complaints and lawsuits on previous discrimination complaints and now being denied over 100 positions the appellant filed for, whistleblowing complaints on worker safety and denied workman's compensation claims when the defendant and the U.S. Justice Department does not want to answer criminal wrongful conspiracy, obstruction of justice, fraud, abuse of authority when the appellant has a court deposition of the fourth level manager from the agency center over the appellant when he admits that the appellant has a black mark against him for filing EEO complaints afforded him under the Constitution of the United States, when the appellant's same type lawsuits filed earlier, have been allowed to proceed in the same district court ? The appellant has been denied access to the court in this Eleventh Circuit while the other circuits have allowed the same type

case to be heard .

The appellant stated new claims that were the result of being denied job positions that the appellant had applied for under the Merit Promotion Announcement. The appellant had exhausted these newly administrative discrimination complaints which were Number 30J, 31J, 32J, 33J, and 34J. These complaints were assigned these numbers NASA in their EEO investigation of these complaints which were the basis of job discrimination in the nonselection of these positions. The appellant was discriminated against because of age, handicap, sex, race, retaliation for filing these complaints previous lawsuit CV-94-N-0016-N and CV-95- S-3323-M and 4 Merit System Protection complaints. The agency criminally had a black mark against the appellant for filing discrimination complaints as evidence clearly shows in the appellant's 4th level supervisor, George McDonough's deposition acquired in July 1999 which requires all of these court cases to be revisited for admitted wrongful retaliation against the appellant. George McDonough admitted the appellant was blackmarked in his deposition . This evidence is shown in *David Nicolas vs. Daniel Goldin,* Case No. CV-97-C-1842-NE . The appellant also received a 21 day suspension under George McDonough and a breach of contract in earlier lawsuits . The agency deliberately discriminated against the appellant by denying him just one promotion under all of the announced promotions the appellant applied for and statistically shown by Dr. David Muse's report stating the appellant had a

one chance in 100,000 of being selected because he had filed EEO complaints and none of the selectees had ever filed any EEO complaints. The court has found that the comprehensive procedural and substantive provisions protecting federal civil servants against arbitrary action by supervisors and providing meaningful remedies for employees unfairly disciplined in a special factor counseling hesitation before authorizing a new kind of federal litigation. *Bush v. Lucas,* 462 U.S. 367 (1983).

This case demonstrates that Marshall Space Flight Center, NASA, has a long pattern and history of discriminating against its employees. The appellant also met the Direct Evidence of age discrimination which consists of testimonial admission by the employer or its agent (George McDonough's deposition admitting blackmarking the appellant). *Wilhem v. Blue Bell, Inc.,* 773 F.2d, 1429, 38 FEP 1600, 38 EPD P. 355558 (4th Cir. 1985). and *EEOC v. Westinghouse elec. Corp.* 725 F.2d 211, 33 FEP 945, 33 EPD P. 34045 (3d Cir. 1983)

There was no subject matter jurisdiction sua sponte lacking. The appellant Cause of action was new and was proper before the court because the appellant had filed for job positions that were new and had not been in Federal court cases before.

The appellant was denied due process in that the district court dismissal of this new case that had new issues and new job nonselection that had not been in court before and the appeals court affirmed without allowing due process of the appellant to have

his discrimination complaints redressed in a court of law thereby violating the appellant's Constitutional rights under every amendment to the U.S. Constitution including but not limited to the fourteenth amendment.

Employment discrimination claim.

The appellant shows old cases that were falsely denied against the appellant by wrongful statement by the U.S. Attorney and NASA to the court. These have been shown to show background of the wrongful acts against the appellant.

Evidence of discriminatory acts occuring years prior to the pertinent period may be considered on the issue of whether a pattern of discriminatin acts occurring years prior to the pertinent period may be considered on the issue of whether a pattern of discrimination existed, leading up to the period in question. *Cormier v. P.P.G. Industries, Inc.* 519 F. Supp. 211 (W.D. La 1981), Affd 702 F. 2d 567 (5th Cir. 1983)

The culture of NASA management, including NASA Administrator Daniel Goldin, is that they are driven by higher management's desire to have a diverse culture at all costs which demand selecting people to fill all positions that fall in line to this doctrine and support top management in the same manner as the communist select people that are loyal and by being loyal then management can stay in power. This is the driving force behind each

selection. The selection does not even have to be qualified, only loyalty counts and will lie for the supervisor if need to . As in my case, being better qualified with years of service and accomplishments has nothing to do with the selection. This happens daily during cover-ups , forgery, abuse of authority, fraud , conspiracy, lying , obstruction of justice, which shows in the agency's lawsuit where the FBI proved that contract agreements had been forged by changing would to could as carried in a news article in the Wall Street Journal reported November 5, 1999. The Grumen Company vs. NASA . These same acts are played out all over NASA by Goldin and NASA management in discriminating against the appellant and other NASA employees that management will not select for merit promotions and they disregard the merit system and the discrimination laws . The agency management and attorneys and the U.S. Justice Department attorneys have lied in a brief to the Eleventh circuit Court of Appeals and the Eleventh Circuit Court of Appeals said the appellant would have won had he filed a discrimination complaint on a breach of contract in a settlement agreement in CV-94-N-0016-M . The Justice Department lied in their brief to the Eleventh Circuit Court of Appeals by stating that the appellant did not file a discrimination complaint on the settlement agreement when the appellant did file a discrimination complaint on the breach of contract settlement and the appellant did appeal to the EEOC and had a docket case and a decision. This was all shown to the Appeals Court and they still denied the appellant his appeal. This is wrongful and evil

discrimination against this appellant and has been going on for over ten years. This policy and practice has existed ever since Daniel Goldin has taken over as administrator at NASA. NASA has a policy of black marking individuals that have filed EEO complaints on nonselection and this policy has been proven by Dr. David Muse's statistical anaylsis in U.S. District Court case number CV- 97-C-1842-NE David Nicolas vs. Daniel Goldin clearly shows that if you ever filed an EEO complaint against the agency that you would never be promoted and your chances of being promoted in comparison to selectees that have never filed a discrimination complaint is one chance in a 100,000 of ever being promoted.

Whistleblowing complaints.

The agency and the Justice Department misled the court and succeeded in the court dismissing the case under Res Judicata that had nothing to do withthe new complaints being denied. These were new announced positions that the appellant had applied for and was denied because of discrimination.

The Appeals Court has failed to realize that the appellant filed this lawsuit on new job discrimination claims that had not been raised before and was a totally new cause of action. The Agency and Justice Department misled the court in believeing that these ligitimate complaints should not be before the court.

The District Court judge erred and abused his

discretion and entered into a conspiracy with the Justice Department and the Agency to conjure up a Res Judicata flawed reason to dismiss the case that met all of the requirements a new Novo litigated of job denial discrimination case that was proper before the District Court. The same type job discrimination cases have been before the district Court and the court has allowed them to move through the court as the law allows and one of the appellant's cases CV-95-S-3323-M is now before the District Court under a new judge , Judge Butrum . The case was taken away from Lynnwood Smith after he dismissed this case. Another case , David Nicolas vs Daniel Goldin, CV-94-C-1842-NE, which was like the appellant's case, was allowed to move through the district court.

The Appeals Court failed to review the genuine dispute issues of material facts in favor of the petitioner. *Miranda, Supra citing american and Foreign Ins. v. Colonial Mfg. Co.,* 936 F.2d 1162, 1164 (11th Cir. 1991).

The district court is using a double standard in the way this appellant has been treated. The court allowed David Nicolas vs. Daniel Goldin in case No. CV-97-C-1842-NE, the same type job discrimination with some of the same positions, to proceed through the court and win a settlement which will amount to over $100,000.00 benefit to Mr. Nicolas and I believe $20,000.00 in attorney fees to his attorney

John Benn of Sherfield, Alabama. One difference is that Mr. Nicolas had not been retaliated against for filing whistleblowing claims with OSHA and EPA on worker safety and filed for corrective action with the OSC and MSPB and this court. And Mr. Nicolas had a different judge, District Court Honorable Clemonts, while the appellant had an angered judge from a previous case of the appellant, CV-95-S-3323-M , Lynnwood Smith who had dismissed ligitimate claims of retaliation by the same defendant and same agency and Justice Department attorneys. Mr. Nicolas had not been persecuted and harrassed by the agency as the appellant had and Nicklas has not developed diabetes and depression as a result of the wrongful acts against the appellant over the years. The petitioner meets the three-prong definition of disability . He has diabetes and depression, he has a medical record on file for this disability, and agency management has records of Form 256 showing handicap.

42 USC s 12102. *Poff v. Prudential Ins. Co.,* 4 AD cases 596 (E.D. Pa. 1995) 42 U.S.C. S 12102(2) As under Title VII and the Rehabilitation Act, a wide range of discriminatory practices are forbidden as disparate treatment under the ADA's general ban on employment discrimination. 42 U.S.C. S 12112(a). Concerning harassment as a viable theory of discrimination under the ADA, see *Rivers v. Domino's Pizza,* 5 AD cases 1717 (E.D. Pa. 1997) *Hudson v. Loretex Corp.* F.Supp (N.D.N.Y. 1997) (citing 29 C.F.R. s 1630.12(b) Concerning retaliation causes of action under the ADA see e.g.; *Krose v.*

American Sterilizer.

The Agency finally admitted the wrongful treatment of the appellant in a recent affidavit by the appellant's Division Chief, Robert Bechtel, where he states that he gave the appellant a seven-day suspension from work because the agency asked him to give the suspension (See affidavit and MSPB case file attached affidavit with court.)

The Agency did not want to answer the conspiracy obstruction of justice charge and other criminal charges and that is why the agency and Justice Department attorneys misled the court to have this case dismissed by saying these cases had been tried before which was not true . This case grew out of a new cause of action that had not been tried before in the district court. District court case CV-94-N-0016-M and CV-95-S-3323-S were referenced in this case by the appellant for information and background only.

It is very serious when a court disallows citizens to file a court action when the law clearly states that the citizen has the right to have his complaint redress in a court of law. The appellant has been treated different than others that have filed the same type case . The appellant's constitutional rights have been violated. The American people will ultimately judge this case.

Regardless of what the District Court judges conjured up reason in justifying these claims in

dismissing this Pro Se appellant, the District Court Judge Lynnwood Smith denied the appellant the right to file his lawsuit when a new cause of action that had never been in court before concerning job discrimination where the appellant had applied for competitive placement position and was denied because of discrimination on the following bases of age, handicap, race, sex, retaliation, national origin, religion and color. The plaintiff was wrongfully sanctioned by the district court when it dismissed the claim of discrimination under the U.S. Constitution of America and used the Res Judicata to camoflauge new ligitimate claims of discrimination on new jobs announced under the agency competitive placement plans. Further these positions and these new discrimination claims had never been in court and were not subjective to the Res Judicata doctrine that the court used in its ruling. Further, the district court and the appeals court erred when they ruled that the appellant could not bring a Merit Systems Protection Board case that contained discrimination claim before the court. In "The Guide for Pro Se Petitioners" prepared by the United States Court of Appeals from the Federal Circuit. The appellant obeyed the judges order to the best of his ability and followed the outline of previous complaints that had been accepted by the same court and judges, Case CV-95-S-3323-M as an example. The court could have dismissed any claim that had been adjudicated before ; however, all of these new discrimination claims that were from a new cause of action and before the district court for the first time and should

not have been dismissed and the Merit Systems claims that contained discrimination should not have been dismissed.

The court at least should rule in the plaintiff's favor in this case and allow these new untried discrimination complaints as listed below to move forward through U.S. District Court by ordering the court to allow these new discrimination complaints on the job announcements through the Agency Competitive Placement Plan to be adjudicated in this case by sending it back to the U.S. District Court or allowing the plaintiff to file a new cause of action on these discrimination complaints 30J, 31J, 32J, 33J, and 34J. The following complaint was written modeled after receiving a copy of David Nicolas's complaint vs. Daniel Goldin case number CV-97- C-1842-NE in U.S. District Court Northern District. This case was under Judge Clement of this circuit and was settled in David Nicolas receiving a settlement of over $100,000.00 in benefits for the discrimination which his complaint was on the same type job position and same type discrimination and the appellant Bobby Kennedy was older and more qualified than David Nicklas and appellant had nine years more time with NASA than Nicolas and had been Nicolas's supervisor and should be treated the same as Nicolas even the appellant does not have an attorney and Nicolas had an attorney, John Benn of Muscle Shoals. The appellant has been treated differently by the court than David Nicolas which is unfair discrimination because the appellant has filed the complaint and it has been dismissed. The agency

investigated these complaints and issued investigative reports listed as number 30J, 31J, 32J, 33J, and 34J, and the district court has accepted the same type discrimination complaints on nonselection for different jobs that the appellant had applied for and filed in the following cases CV-95-S-3323-N and CV-94-N-0016-N and were accepted for litigation.

The complaints that made up this case CV-97-S-3118-M the same judge Lynnwood Smith was misled by the agency and the Justice Department by claiming redres judicata by claiming that the same job positions in CV-97-S-3118-M was the same positions that were in CV-95-S-3323-N and CV-94-N-0016-N. These job positions were not the same and were new job positions, not related to the job positions in CV-95-S-3323-N and CV-94-N-0016-N and the agency and the Justice Department entered into a conspiracy by claiming that they were the same positions and Judge Lynnwood Smith went along with this conspiracy by dismissing this case and defrauded the appellant out of his just constitutional rights . Judge Lynnwood Smith wanted to punish the appellant by sanctioning and dismissing the appellant because the appellant had written the new complaint that is the subject of this appeal CV-97-S-3118-M and was written in the same manner and outline that had been used in CV-95-S-3323-M and CV- 94-N-0016-N and this same Judge Lynnwood Smith had accepted and allowed CV 95-S-3323-M to move through the court and is at the present time in the discovery

phase. This is a clear abuse of discretion on Judge Lynnwood Smith's part to use a fraudulent reason and decision to dismiss a ligitimate new claim that has come from an entirely new cause of action that arose from new claims of discrimination that was based on new competitive placement positions applied for and denied through discrimination and has nothing to do with earlier job discrimination complaints that come from a different cause of action.

The complaint will read as follows to enable the court to easily understand this case.

COMPLAINT FOR CIVIL DAMAGES

Introduction

1. The present actions seek declaratory relief and compensatory damages against the National Aeronautics and Space Administration (NASA) for wrongful racial, age and sex discrimination against Plaintiff as well as for retaliatory conduct against Plaintiff for previous engagement in protected activities under EEO laws.

Jurisdiction

2. The court has jurisdiction pursuant to 28 U.S.C., & 1331 , based upon the action arising under the Constitution, laws and treaties of the United States.

3. The court's jurisdiction is also predicated upon the provisions of 42 U.S.C., & 2000, *et seq.*, 29 U.S.C. & 633a, and applicable regulations including specifically 29 C.F.R., 1614.103, and 29 C.F.R. 1614.101 .

The Parties

4. Plaintiff is a white Caucasian male currently employed by Defendant National Aeronautics and Space Administration at its facility in Huntsville, Alabama. Plaintiff is a resident of Marshall County, Alabama.

5. Defendant Daniel S. Goldin is the Administrator of the National Aeronautics and Space Administration, a Federal governmental agency.

6. Defendant National Aeronautics and Space Administration (hereinafter referred to as "NASA" is a Federal governmental agency.

Factual Allegations

7. That on or about 1994, NASA posted a job vacancy announcement for position of Supervisor, Vacancy Announcement No. CPP-94-47-CI. and Non-Supervisor when a younger , non handicap, woman, Linda Brewster was awarded the position.

8. Plaintiff applied for and was qualified for

this position.

9. Plaintiff timely initiated an administrative complaint after learning of his non-selection based upon sex, handicap, race , and age discrimination as well as reprisal.

List of EEO complaints in this suit which have met EEOC Requirements to be filed in U.S. District Court and Have Been Dismissed Unlawful in this Case :

COUNT I

1. That Plaintiff's nonselection for this position was the result of wrongful reprisal.

2. That as a proximate result and consequence of said wrongful actions, Plaintiff has been damaged and has suffered emotional distress.

3. Plaintiff prays for the relief set forth at the conclusion of this Complaint.

30 J NCN-96-MSFC-A012

1. Wrongful removal Appellant Deputy Branch Chief

2. CPP-95-73-JP

AST Technology Utilization

Jerry Seemann Age 39 years old
Kenneth R. Ferradez
GS/GM 1801 - 15
August 22, 1994

Benita C. Hayes
CPP-94-47-CL
9-9-94

Linda Brewster
9-5-96

James Blanch

Larry Crabtree

David Nicolas

Joined with 30J above

COUNT II

4. That Plaintiff's non-selection for this position was the result of wrongful reprisal.

5. That as a proximate result and consequence of said wrongful actions., Plaintiff has been damaged and has suffered emotional distress.

6. Plaintiff prays for the relief set forth at the conclusion of this Complaint.

32J NCN-96-MSFC-A030
MSFC-ES-01-05
Gary Lyles, Chief Engineer Space Shuttle
Main Engine CPP-96-21-DC

Supervisory AST - Optical Physics GS-15

COUNT III

7. That Plaintiff's non-selection for this position was the result of wrongful age discrimination.

8. That as a proximate result and consequence of said wrongful actions, Plaintiff has been damaged and has suffered emotional distress.

9. Plaintiff prays for the relief set forth at the conclusion of this Complaint.

33J NCN-96-MSFC-A012
J 96-A016
NCN-96-MSFC-A030
NCN-97-MSFC-A007
CPP-96-42-DC

The appellant was rated ineligible

AST Navigation guidance and Control System GS-861-14

Linda Brewster - E.C. Smith was the

person that selected Linda Brewster. He gave the plaintiff the 7 day suspension to retaliate because the plaintiff had filed EEO complaints on this promotion. The plaintiff was rated ineligible AST Navigation Guidance and Control Systems, Linda Brewster age 38 Plaintiff age 50. Fred Roe Jr. Rated Linda Brewster Robert Stevens second level supervisor was the reviewing supervisor. Fred Roe was the selecting official. Linda Brewster was team leader on organizational chart. Fred Roe wrote the KSAOC and was to be selecting official. However E.C. Smith signed as the selecting official. Plaintiff was rated ineligible because he had filed EEO lawsuits on Randall, Chaffin, Smith . Fred Roe wrote job description for team leader. The plaintiff had qualified for the same type positions before.

CPP-96-33-CL
AST - Experimental Facility

Development GS-801-14

Donald Scott McCluney had no supervisory experience. Plaintiff had 15 years supervisory experience.Personnel representative Carolyn Lundy did not include the plaintiff's awards in this promotion. Plaintiff was 60 years old and the selectee McCluney was 38 years old.

John R. Ransburgh - Ransburgh reviewed the supervisor's rating and was the selecting official. Resulted in a conflict of interest.

Dr. George McDonough in his deposition stated the plaintiff had a black mark against him. Dr. Muse's report shows the appellant had one chance in 100,000 of being selected for a supervisory position.

COUNT IV

10. That Plaintiff's non-selection for this position was the result of wrongful race discrimination

11. That as a proximate result and consequence of said wrongful actions, Plaintiff has been damaged and has suffered emotional distress.

12. Plaintiff prays for the relief set forth at the oconclusion of this Complaint.

34 J NCN-97-MSFC-A0017
Equal Employment Manager GS-260-15

CPP-97-1-SP

Charles Scales Cancelled

Legal Claims

13. For Plaintiff's claims, each enumerated below, he realleges discrimination stated above as is fully set forth herein for each and every statement of claim.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff prays that this Court :

A. Will assume jurisdiction over this action ;

B. Enter a Declaratory Judgment that Defendants' actions violated relevant provisions of Federal law;

C. Enter a judgment assessing compensatory damages as determined by the jury and related remedies authorized by law;

D. Award attorney fees and costs of this action as authorized by Federal statue.

CONCLUSION

The appellant had received permission to file discrimination complaints from NASA in U.S. District Court and the complaints were over 180 days old with no decision.

The appellant obeyed the court order to rewrite the complaints to the best of his ability in a very complex case and ;should not be dismissed without allowing the discrimination complaints guaranteed by the Constitution to be redress in a court of law.

The present actions seek declaratory relief and compensatory damages against the National Aeronautics and Space Administration (NASA) for wrongful racial, age and sex discrimination against

the Plaintiff as well as for retaliatory conduct against the plaintiff for previous engagement in protected activities under EEO laws.

The court has jurisdiction pursuant to 28 U.S.C. & 1331, based upon the action arising under the Constitution, laws, or treaties of the United States.

The Court's jurisdiction is also preendented upon the provisions of 42 U.S.C. & 2000, et seq., 29 U.S.C. & 633a, and applicable regulations including specifically 29 C.F.R., 1614.103, and 29 C.F.R. 1614.101.

Petitioner respectfully requests that this Court issue its Writ of Certiorari to review the challenged decision of the United States Court of Appeals for the Eleventh Circuit and allow the Petitioner to have a jury trial.

Respectfully submitted, November 20, 1999.

Bobby W. Kennedy

Bobby W. Kennedy
Pro Se
1158 4th Ave., N.W.
Arab, AL 35016
256-544-3384 Work
256-586-8624 Home

APPENDIX A --ORDER ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED AUGUST 26, 1999

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 98-6725

BOBBY WAYNE KENNEDY, Plaintiff-Appellant

versus

DANIEL S. GOLDIN, Administrator
National Aeronautics and Space
Administration, BEN L. ENCREICH,
Chairman, U.S. Merit Systems
Protection Board, et al.,
Defendant-Appellees.

On Appeal from the United States District Court for the Northern District of Alabama

---

ON PETITION(S) FOR REHEARING AND PETITION(S) FOR REHEARING EN BANC
(Opinion _____, 11th Cir., 19___, ____F.2d___).

Before: TJOFLAT, EDMONDSON and CARNES, Dircuit Judges.

PER CURIAM:

The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be poiled on reharing en banc (Rule 35, Federal Rulels of Appellate Procedure; Eleventh Circuit Rule 35-5), the Petition(s) for Rehearing En Banc are DENIED.

ENTERED FOR THE COURT:

(Ed Carnes
UNITED STATES CIRCUIT JUDGE

APPENDIX B- JUDGMENT OF THE
UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT
DATED JUNE 10, 1999

UNITED SATES COURT OF APPEAL
FOR THE ELEVENTH CIRCUIT

No. 98-6725
Non Argument Calendar

District Court Docket No. CV97-S-3118 M

FILED
U.S. COURT OF APPEALS
JUN 10 1999

THOMAS K. KAHN
CLERK

BOBBY WAYNE KENNEDY

Plaintiff-Appellant,

versus

DANIEL S. GOLDIN, Administrator, National Aeronautics and Space Administration.
BEN L. ENGREICH, Chairman, U.S. Merit SystemsProtection Board. et al.

Defendants-Appellees

Appeal from the United States District Court
for the Northern District of Alabama

Before TJOFLAT, EDMONDSON and CARNES, Circuit Judges

JUDGMENT

This cause came to be heard on the transcript of the record from the United States District Cort for the Northern District of Alabama and was taken under submission by the Court upon the record and briefs on file, pursuant to Eleventh Circuit Rule 34-3;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this court that the order of the said District Court in this cause be and the same is hereby AFFIRMED.

It is further ordered that plaintiff-appellant pay to defendants-appellees the costs on appeal to be taxed by the Clerk of this Court.

Entered : June 10, 1999
For the Court Thomas K. Kahn, Clerk

By :Matt Davidson
Deputy Clerk

ISSUED AS MANDATE : SEP 13 1999

COSTS :

Costs $e4.50

APPENDIX C - JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT, DATED JUN 10 , 1999

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

Filed
U.S. Court of Appeals
Eleventh Circuit
Jun 10 1999
Thomas K. Kahn
Clerk

No. 98-6725
Non-Argument Calendar

D.C. Docket No. CV97-S-3118-M

BOBBY WAYNE KENNEDY,

Plaintiff-Appellant,

versus

DANIEL S. GOLDIN, Administrator, National Aeronautics and Space Administration;
BEN L. ENCREICH, Chairman, U.S. Merit Systems Protection Board, et al.,

Defendants-Appellees

Appeal from the United States District Court for the Northern District of Alabama

(June 10, 1999)

Before TJOFLAT, EDMONDSON and CARNES, Circuit Judges.

PER CURIAM :

Bobby Wayne Kennedy, proceeding pro se, appeals the court's dismissal with prejudice of his civil action under numerous federal and state laws. The dismissal was based upon his failure to obey a court order. He also appeals the imposition of sanctions and denial of his motion for reconsideration.

Kennedy vaguely argues that he complied with court orders by omitting previously adjudicated claims from his complaint, and by making more specific allegations. He challenges the court's imposition of Rule 11 sanctions, contending that the court's decision not to exercise jurisdiction over his Merit Systems Protection Board claims was erroneous because they included discrimination claims. Finally, he argues that the court should have reconsidered its order, pursuant to Fed.R.Civ.P. 59(e).

This court reviews the application of res judicata *on a de nono* basis. See Israel Discount Bank Ltd. v. Entin., 951 F.2d 311, 314 (11th Cir. 1992). The dismissal of an action under Rule 41(b) for failure to comply with court orders is reviewed only for abuse of discretion. See Goforth v. Owens, 766 F.2d 1533, 1535 (11th Cir. 1985). The Court uses the same standard to review the imposition of Rule 11

sanctions. See Worldwide Primates, Inc. v. McGreal, 87 F.3d 1252, 1254 (11th Cir. 1996). We can conduct plenary review of subject matter jurisdiction sua sponte and have an obligation to inquire into subject matter jurisdiction whenever it may be lacking. See Baltin v. Alaron Trading Corporation, 128 F.3d 1466 (11th Cir. 1997), cert. denied, 119 S.Ct. 105 (1998). We review a denial of a motion under Rule 59(e) only for abuse of discretion. Lawson v. Singletary, 85 F.3d 502, 507 (11th Cir. 1996).

We have reviewed Kennedy's prior judicial and administrative actions, his complaints in the present action, the district court's order, the motion for reconsideration, and the briefs of the parties. After doing so, we conclude that Kennedy's claims were barred by *res judicata*, and that he should have but failed to make more specific allegations in his second amended complaint. Because Kennedy failed to obey the district court's order, its dismissal of the action with prejudice and imposition of Rule 11 sanctions were proper. The district court correctly concluded that it had no subject matter jurisdiction over Kennedy's Merit Systems Protection Board claims. Finally, we hold that the court's denial of reconsideration was proper, notwithstanding Kennedy's belated attempts to make more specific allegations.

AFFIRMED

APPENDIX D - ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION, DATED SEPTEMBER 10, 1998

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHER DISTRICT OF ALABAMA
MIDDILE DIVISION

BOBBY WAYNE KENNEDY,

Plaintiff,

vs. CV97-S-3118-M

DANIEL S. GOLDIN, ETC., ET AL.,

Defendants.

ENTERED
Sep 10 1998

ORDER

The court has before it the August 21, 1998 motion of plaintiff to alter, amend, and vacate the court's order of August 14, 1998, and the response of defendants filed September 8, 1998. Having considered plaintiff's motion in light of the record in this action, and defendants' response thereto, the plaintiff's motion is DENIED.

DONE this 10th day of September, 1998.

Lynwood Smith
United States District Judge

APPENDIX E - ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA MIDDLE DIVISION, DATED AUGUST 25, 1998.

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

BOBBY WAYNE KENNEDY

Plaintiff,

vs. CV-94-S-3118-M

DANIEL S. GOLDIN, ETC., ET AL.,

Defendants.

ENTERED
Aug 25 1998

ORDER

The court has before it the August 21, 1998 motion of plaintiff to alter, amend, and vacate the court's order of August 14, 1998. The defendants are directed to respond to the motion in writing on or before September 8, 1998.

DONE this 25th day of August, 1998.

(Lynwood Smith)
United States District Judge

APPENDIX F - ORDER OF THE UNITED STATES DISTRICT COURT NORTHERN DISTRICT OF ALABAMA, MIDDLE DIVISION, FILED AUGUST 14, 1998

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA

BOBBY W. KENNEDY,

Plaintiff,

vs. Civil Action No.
CV-97-S-31188-M

DANIEL S. GOLDIN
Administrator, National
Aeronautics and Space
Administration, ALEXIS
HERMAN, Secretary of the
United States Department of
Labor ; BEN L. ERDREICH,
Chairman, United States Merit
Systems Protection Board;
Defendants.

ENTERED
Aug 17 , 1998

ORDER

In accordance with the memorandum opinion entered contemporaneously herewith, it is ORDERED that defendants' motion to dismiss is granted. Costs are taxed to plaintiff. The clerk is directed to close this file.

DONE this 14th day of August, 1998.

(Lynwood Smith)
United States District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
MIDDLE DIVISION

Filed
98 Aug 14
U.S. District Court

BOBBY WAYNE KENNEDY

Plaiantiff,

vs. Civil Action No. CV 97-S-3118-M

DANIEL S. GOLDIN, Administrator, National Aeronautics and Space Administratin: ALEXIS HERMAN, Secretary of the United States Department of Labor; BEN L. ERDREICH Chairman, United States Merit Systems Protection Board ;
Defendants.

ENTERED
Aug 17 1998

MEMORANDUM OPINION

Bobby Wayne Kennedy, appearing *pro se,* filed the present action on December 1, 1997, alleging numerous acts of discrimination and retaliation by various defendants. By order entered March 3, 1998, this court granted defendants' motion for more definite statement . In that motion, defendants assert that most of the claims asserted by plaintiff were alleged, considered, and dismissed in two prior cases *Kennedy v. Goldin* (CV-94-N-0016-M), in which United States District Judge Edwin L. Nelson

entered summary judgment in favor of defendants on all claims ("the 1994 action");[1] and *Kennedy v. Goldin* (CV-95-S-3323-M), in which this court entered partial summary judgment in favor of defendants ("the 1995 action"),[2] After reviewing plaintiff's complaints in the 1994 and 1995 actions in conjunction with the pleadings in this case, this court found substantial overlap between plaintiff's allegations in prior actions and the case now before the court. Accordingly, the court's March 3, 1998 order granting defendants' motion for more definite statement directed plaintiff to amend his complaint, using the Federal Rules of Civil Procedure as his guide, and to delete any claims previously adjudicated on the merits, or still pending in the 1995 action, CV-95-S-3323-M. Plaintiff filed a second amended complaint, purporting to comply with the court's order, on March 16, 1998. On March 30, 1998, defendants moved to dismiss the second amended complaint, and, renewed their motion for sanctions, for plaintiff's failure to comply with this court's order.

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1 The Eleventh Circuit Court of Appeals affirmed the judgment in an unpublished opinion. Kennedy v. Goldin, 86 F.3d 1170 (11th Cir. 1996).

2 The Eleventh Circuit affirmed this court's December 19, 1996 order, granting defendants' partial summary judgment and dismissing some claims on March 26, 1998. See Kennedy v. Goldin, 140 F.3d 1043 (11th Cir. 1998). The stay in that action has not yet been lifted.

I. DISCUSSION

A. Standards of Review

"In this circuit it is well established that dismissal with prejudice is a drastic remedy to which a court may resort only in extreme situations where there is a clear record of delay or contumacious conduct by the plaintiff." *Pardee v. Moses,* 605 F. 2d 865, 866 (5th Cir. 1979) [4] (citations and internal quotation marks omitted). In *Pardee*, the Fifth Circuit held that, where "an effort is made to comply with [a court's order for more definite statement], the insufficiency of the effort does not justify automatic dismissal of the action." *Pardee,* 605 F.2d at 866. This principle reflects due consideration for the extenuating circumstance [] that it was written by a lay litigant appearing *pro se. . . " Id. at* 866-67 (citation and internal quotation marks omitted).

On the other hand, Bobby Wayne Kennedy is not the average totally inexperienced lay litigant. He has pressed similar claims before this court and on appeal to the Eleventh Circuit on two prior occasions. In any event, Kennedy's *pro se* status can-not breathe new life into claims that previously

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[3] Kennedy filed a first amended complaint on January 29, 1998 in response to defendants' letter pointing out that his original complaint reasserted claims already adjudicated in his two prior actions.

[4] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc), the Eleventh Circuit adopted as binding precedent all decisions of the former Fifth Circuit handed down prior to October 1, 1981.

have been adjudicated on the merits; the bar of res judicata is not so easily overcome. As explained below, identical claims between identical parties which already have been adjudicated on the merits may not be relitigated. Twice before, plaintiff has been warned that his pro se status is not an "impenetrable shield, for one acting pro se has no license to harass others, clog the judicial machinery with meritless litigation , and abuse already overcrowded court dockets." *Farguson v. Mbank Houston,* N.A. 808 F. 2d 358, 359 (5th Cir. 1986). For such reasons, this court is not as inclined as it would be in the case of the average lay litigent to indulge Mr. Kennedy's attempt to take a third bite at the same apple.

This court first will attempt to decipher the claims asserted by him in the 1994 and 1995 actions, to determine whether any are barred by the doctrine of *res judicata.*

B. Plaintiff's Claims in the Present Action

Upon first reading, plaintiff's second amended complaint appears markedly similar to his original and first amended complaint : dense, conclusory, and lacking readily decipherable claims. Kennedy alleges violations of : (1) the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States; (2) Title VII of the Civil Rights Act of 1964, as amended by the Civil rights Act of 1991 U.S.C. SS 2000e et seq.; [5] (3) 42 U.S.C. S 1983

[5] The Equal Employment Opportunity Act of 1972 (42 U.S.C. S 2000e-16(c) brought federal employees within the scope of Title VII.

and S 1985; (4) SS 501, 502, and 504 of the Rehabilitation Act of 1973, 29 U.S.C. SS 791, 792, and 794; (5) the Age Discrimination in Employment Act ("ADEA"), 29 U.S.C. SS 621 et seq., pursutant to 29 C.F.R. S 1614.204; (6) the Civil Service Reform Actof 1978, 5 U.S.C. SS 2301, et seq. ("CSRA"); (7) the Whistleblower Protection Act, 5 U.S.C. SS 1213 et seq.; and, (8) state law claims of fraud and defamation. Those claims are similar to - and, in some cases, identical to - claims disposed of in prior litigation.

C. Doctrine of Res Judicata

Under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Montana v. United states,*, 440 U.S. 147, 153, 99 S. Ct. 970, 973, 59 L.Ed.2d 210 (1979). Invocation of the bar requires proof of four elements : (1) the prior judgment must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) the parties, or those in privity with them, must be identical in both suits; and (4) the same cause of action must be involved in both suits. *Ray v. Tennessee Valley Authority,* 677 F.2d 818, 821 (11th Cir. 1982), (citing *Stevenson v. International Paper Co.,* 516 F.2d 103, 108 (5th Cir. 1975) cert. denied, 459 U.S. 1147, 103 S. Ct. 788.

The summay judgments rendered in CV-94-N-0016-M and CV-95-S-3323-M constitute judgments on the merits by competent courts of

jurisdiction. See 10 Wright, Miller & Kane, *Federal Practice and Procedure :* Civil 3d S 2712, at 584-85. Additionally, this action involves the same parties as both previous actions. The only remaining question, then, is whether the present action raises the same causes of action as the two prior actions.

D. Comparison with 1994 and 1995 Actions

Kennedy asserts numerous complaints of discrimination based upon age, race, sex, and disability. Kennedy's discrimination claims also were the subject of four administrative EEO complaints designated as Nos. 30J, 32J, 33, and 34. Those claims will be addressed together.

1. Claims of discrimination

A comparison of paragraph ten of the present action with paragraph seven of the complaint filed in the 1994 actions is instructive. The only differences

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As noted in text on pages 1-2 supra, for purposes of simplicity and clarity, this court sometimes will refer to the two earlier civil actions. CV-94-N-0016-M and CV-95-S-3323-M, as the "1994 action" (or "complaint") and the "1995 action" (or complaint"), respectively.

The analysis which follows includes plaintiff's claims under Title VII, the ADEA, and SS 501, 502, and 504 of the Rehabilitation Act of 1973, 29 U.S.C. SS 791, 792, and 794.

in the text of each paragraph are identified by underlining.

PRESENT COMPLAINT	1994 COMPLAINT
10. Plaintiff alleges that since filing for these positions that have not been adjudicated a pattern, practice, policy and conspiratorial intent exists of illegal employment practices within the agency whereby qualified, non-minority, male, over forty years of age, handicapped, more qualified and moe experienced employees are routinely non-selected for advancement in favor of persons who fulfill the agency's desire for a youthful (under forty years of age) handicapped management corps and to meet the agency's desire for "diversity" and that those who file grievances and court suits face retaliation from agency management. Further, when a	7. Plaintiff alleges that a pattern, practice, policy and conspiratorial intent exists of illegal employment practices within the agency whereby qualified white, non-minority, male, over 40 years of age, handicapped more qualified, and more experienced employees are routinely non-selected for advancement in favor of persons who fulfill the agency's desire for a youthful (under forty years of age)nonhandicapped management corps and to meet the agency's desire for "diversity and that those who file grievances and court suits face retaliation from agency management sources. Further, when a selection for advancement is made from within the over forty protected class the youngest applicant is almost invariably selected. Younger nonhandicapped, less qualified

selection for advancement is made from within the over forty protected class the youngest applicant is almost invariably selected . Younger non-handicapped, less qualified employees are promoted to position while older, handicapped more qualified and more experienced employees are not promoted to such positions within the agency. The plaintiff is a victim of reverse discrimination in employment because of affirmative action of place unqualified persons in positions that the plaintiff has qualified for.

employees are promoted to supervisor positions while older, handicapped, more qualified and more experienced employees are not promoted to such positions within the agency.

(See Second Amended Complaint (Doc. No. 11) 10 (emphasis supplied); Defendants' Motion for More Definite Statement, Exhibit 1 7 (emphasis supplied).)

It is readily apparent that plaintiff is attempting to render his present complaint justiciable by adding the phrase, "since filing for these positions that have not been adjudicated . . " This court notes, however, that such language - unaccompanied by any factual allegations which identify either "these positions" or the date (s) upon which Kennedy "filed" applications for each - would not likely suffice to

defeat a properly supported motion for summary judgment. Indeed , plaintiff does not identify any positions or promotions for which he applied, and was denied, after the date on which his 1994 action was dismissed.

Similarly, paragraphs eleven, thirteen, fourteen, and fifteen in the present action borrow substantially from paragraphs eight, eleven, twelve, and thirteen of the 1994 complaint, respectively. To the extent plaintiff seeks, in the present action, to reopen claims resolved in the 1994 action, he plainly is barred from doing so by the doctrine of res judicata. A close comparison of the allegations in plaintiff's 1995 complaint reveals similar overlap with the claims asserted in the present action. For example, paragraphs nine, ten, and twelve through fifteen in the 1995 complaint are virtually identical to paragraphs ten through fifteen in the present action. The only difference appears to be the limiting language discussed above, which plaintiff inserted into the opening sentence of every allegation in the present action.

To avoid the bar of res judicata, any claims of a pattern, policy, or practice of discrimination based upon age, race, sex, or disability, or an act of retaliation, must be limited to time periods and discriminatory acts not covered by either the 1994 or 1995 actions. However, Kennedy has provided no dates on which the discriminatory acts asserted in this action allegedly occurred. Moreover, he does not allege that he applied for, but was denied any promotions after the dates covered by the two prior actions. Kennedy has failed to support his broad

assertions with any specific factual allegations which could support a claim of discrimination, despite being ordered to file a more definite statement of his claim. Accordingly, plaintiff's claims in paragraphs ten through fifteen of this action based upon Title VII, the ADEA, or the Rehabilitation Act, and asserted in administrative EEO complaints 30J, 32J, 33, and 34, are due to be dismissed.

2. Constitutional Claims pursuant to S 1983 and S 1985

Kennedy asserts defendants violated his rights under the First, Fourth, Fifth, Sixth, and Fourteenth Amendments to the Constitution of the United States. He brings the claims under the procedural vehicles of 42 U.S.C. S 1983 and S 1985.

As this court previously instructed Kennedy, however, "S 1983 has no application to the federal government or its officers." See *Mays v. United States Postal Service*, 928 F. Supp. 1552, 1557 n.4 (M.D. Ala. 1996).

Moreover, plaintiff's S 1983 and S 1985 claims are premised upon the same conduct for which Kennedy seeks redress under Title VII, the ADEA, and the rehabilitation Act. "When the same set of facts supports a Title VII claim and a non-title VII claim against a federal employer, Title VII prempts the non-Title VII claim." *Pfau v. Reed*, 125 F.3d 927, 933 (5th cir. 1997). Indeed, this court instructed Kennedy on precisely that point in the 1995 action :

In *Bown v. General Services Administration*,

425 U.S. 820, 835, 96 S.Ct. 1961, 1969 (1976), the Supreme Court held that Title VII "provides the exclusive judicial remedy for claims of discrimination in federal employment." See also *Canino v. United States EEOC* 707 F.2d 468 (11th Cir. 1983) (holding that former federal employees must bring all employment discrimination claims under Title VII). additionally, the Eleventh Circuit and other circuits have held that the ADEA has similar premptive force because it was modeled on, and has a similar purpose to, Title VII. See *Ray v. Nimmo*, 704 F.2d 1480, 1485 (11th Cir. 1983); *Purtill v. Harris*, 658 F.2d 134, 137 (3d Cir. 1981), cert. denied, 462 U.S. 1131, 103 S. Ct. 3110 (1983); see also, *Dodson v. United States Army Fin. & Accounting Ctr.*, 636 F. Supp. 894, 895 (S.D. Ind. 1986) (" the ADEA is the exclusive remedy for a federal employee who claims age discrimination). s

Courts have also held that "SS 501 and 504 of the Rehabilitation Act adopt the remedies and procedures, and thereby, the preclusive effect, of Title VII; therefore, allegations that state a claim under the rehabilitation Act are not cognizable under any other provision of federal law." *Taylor v. Garrett*, 1992 WL 245933, at *5 (E.D. Pa. 1992); see also, *Johnson v. U.S. Postal Service*, 861 F.2d 1475, 1477 (10th Cir. 1988), cert. denied, 493 U.S. 811, 110 S.Ct. 54 (Rehabilitation Act is the exclusive remedy for handicap discrimination);

Boyd v. United States Postal Service, 752 F.2d 410, 413 (9th Cir. 1985) (same)

(Kennedy v. Goldin, No. CV-95-S-3323-M, at 4-5 (N.D. Ala. Dec. 19, 1996) (unpublished opinion).)

Kennedy's S 1983 and S 1985 claims are premised on the same conduct for which he seeks releif under Title VII, the ADEA, and the Rehabilitation Act. Accordingly, this court determines--for the second time--that those three statutory schemes preclude Kennedy's S 1983 and S 1985 claims and, therefore, they are due to be dismissed.

Significantly, plaintiff does ot assert his constitutional claims directly under the authority of *Bivens v. Six Unknown Named Agents of the Federal Bureau of Narcotics*, 403 U.S. 388, 91 S.Ct. 1999 (1971), as he did in the 1995 action. Even if he had done so, the *Bivens* claims also would be barred by the availability of the exclusive remedies set out in Title VII, the ADEA, and the Rehabilitation Act. This court's dismissal of Kennedy's 1995 *Bivens* claims also would be barred by the availablity of the exclusive remedies set out in Title VII, the ADEA, and the Rehabilitation Act. This court's dismissal of Kennedy's 1995 *Bivens* claims on similar grounds was affirmed by the Eleventh Circuit.

8

See also Oscar Mayer & Company v. Evans, 441 U.S. 750, 756, 99 S. Ct. 2066, 2071 (1979) (instructing that when the legislative history indicates that the source of a section in the ADEA was a complementary section in Title VII, the two statutes are to be construed consistently).

3. Tort Claims

Plaintiff also asserts state law claims for fraud and defamation. Kennedy alleged similar claims for defamation, negligence, and libel in the 1995 action. In the prior action, this court instructed Mr. Kennedy as follows :

> The Supreme Court of the United States has held that a federal court has no subject matter jurisdiction over tort claims against the United States unless the plaintiff has first filed an administrative claim with the concerned agency pursuant to 28 U.S.C. S 2675(a) of the Federal Tort Claims Act, and that claim has been denied or deemed denied by operation of law. *McNeil v. United States*, 508 U.S. 106, 113 S.Ct. 1980 (1993); see also *Lykins v. Polonter, Inc.* 725 F.2d 645, 646-47 (11th Cir. 1984)
>
> The requirement of filing an administrative claim isa jurisdictional prerequisite to suit and camot be waived. *Brown v. United States*, 838 F.2d 1157, 1163 (11th Cir. 1988); *Gregory v. Mitchell*, 634 F. 2d 199, 203-04 (5th Cir. 1981). {} Thus. Kennedy must show proof that he has complied with S 2675(a) in orde to bring his tort claims against the UnitedStates. *Employees Welfare Committee v. E.H. Daws*, 599 F.2d 1375, 1378 n.6 (5th Cir. 1979) ("There must be proof of timely writtennotice of the claim to the appropriate agency which appears of record")(citations

omitted)
(*Kennedy v. Goldin*, No. CV-95-S-3323-M, at 5-6. (N.D. Ala. Dec 19, 1996)(unpublished opinion) (footnote ommitted.)

Kennedy has neither alleged, nor presented any evidence that he filed an administrative claim with N.A.S.A., that N.A.S.A. denied the claim, or that six months have passed since a claim was filed, despite having been informed by this court that he must do so in order to assert tort claims against the federal government. Therefore, Kennedy's state law tort claims are due to be dismissed.

4. Civil Service Reform Act Claims

Ordinarily, the Merit Systems Protection Board ("MSPB") has appellate jurisdiction only over the specific adverse employment actions set forth at 5 C.F.R. S 1201.3. When one of the claims enumerated in that rejulation is asserted in an individual right of action together with a related discrimination claim, the MSPB's review includes the

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28 U.S.C. S 2675(a) provides in pertinent part:

An action shall not be instituted upon a claim against the United States for money damages for injury or loss of property of personal injury or death caused by the negligent or wrongful act of omission of any employee of the Government while acting within the scope of his office or empiooyment, unless the claimant shall have first presented the claim to the appropriate Federal Agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail. The failure of an agency to make final disposition of a claim within six months after it is filed shall, at the option of the claimant any time thereafter, be deemed a final denial of the claim for purposes of this section.

merits of both claims. See 5 U.S.C. S 7701(c). Such "mixed" cases are properly appealed to federal district court. See 5 U.S.C. S 7702(b)(2). All other appeals from MSPB decisions, however, must be directed to the United States Court of Appeals for the Federal circuit. See 5 U.S.C. S 7703(b)(1) : See also *Wildberger v. Federal Labor Relations Authority*, 132 F. 3d 784, 788 (D.C. Cir. 1998).

The MSPB also has limited appellate jurisdiction over an individual right of action involving an alleged whistleblowing reprisal. See 5 U.S.C. S 2302(b)(8). The scope of the Board's review in such an appeal, however, includes only the whistleblower-reprisal issue. See *Thompson v. Department of Justice*, 61 M.S.P.R. 364, 367 (1994). It does not include any related discrimination claims asserted therein.

Both AT-1221-96-0661-W-1 and AT-3443-98-0119-I-1 are limited jurisdiction whistleblowing appeals whose review did not include any related discrimination claims. Indeed, Kennedy was expressly advised of the Board's limited review in such cases on at least one occasion. During a telephonic prehearing conference on MSPB case No. AT-1221-96-0661-W-1 in which Mr. Kennedy participated, administrativie law judge Ramon v. Gomez expressly stated : "I advised the parties that the scope of the Board's review in an individual-right-of-action (IRA) appeal includes only the whistleblower-reprisal issue, and no other affirmative defenses, including discrimination and

reprisal, may be asserted." (Board's Order of November 18, 1996, at 5 (attached to Defendants' Reply Brief) (emphasis supplied).)

Moreover, the final orders in both cases advised Mr. Kennedy that the proper avenue for appeal of the Board's decision was through the Federal Circuit. (See Plaintiff's exhibit 1 at 4; Plaintiff's Exhibit 3 at 2.) Accordingly, this court concludes Kennedy's claims arising from MSPB cases AT-1221-96-0661-W-1 and AT-3443-98-0119-I-1 are not properly before this court, and are due to be dismissed.

II. MOTION FOR SANCTIONS

Rule 11 of the Federal Rules of Civil Procedure provides for sanctions which are designed to "discourage dilatory or abusive tactics and help to streamline the litigation process by lessening frivolous claims or defenses." *Donaldson v. Clark*, 819 F.2d 1551, 1556 (11th Cir. 1987) (*en banc*) (citation omitted). The standard for evaluating a motion for Rule 11 sanctions is "reasonableness under the circumstances," *Donaldson*, 819 F.2d at 1556.

The Eleventh Circuit has upheld an award of sanctions against a *pro se* plaintiff for attempting to "re-hash" claims made in prior litigation. *See Patterson v. Aiken*, 841 F.2d 386 (11th Cir. 1988). In *Patterson*, the district court held that "a man of Patterson's education, given a reasonable amount of time in a law library, could determine that once a

judgment has been entered one cannot file another lawsuit to object to the conduct of the first. *"Patterson*, 841 F.2d at 387 (citing *Patterson v. Aiken*, 111 F.R.D. 354, 357 (N.D. Ga. 1986). The Eleventh Circuit upheld the sanctions even though they were imposed only as to a single count of a multiple count complaints. Id.

The court notes that Mr. Kennedy is a well-educated, experienced lay litigant who has been given every opportunity to correct his faulty pleadings. Indeed, he has repeatedly been advised that claims which already have been resolved on the merits may not be reasserted by filing a new cause of action. This court carefully instructed Mr. Kennedy regarding the doctrine of res judicata in his 1995 action, and once again in ordering a more definite statement of his claims in the present action. Nevertheless, Mr. Kennedy persists in asserting claims which already have been adjudicated, including claims based upon alleged violations of S 1983, S 1985, and state tort law.

Accordingly, this court finds that sanctions for Mr. Kennedy's conduct are appropriate under the circumstances. Defendants' motin for sanctions is due to be granted, and the costs of this action are due to be taxed to Mr. Kennedy.

III. CONCLUSION

For the foregoing reasons, defendants' motion to dismiss is due to be granted. Defendants' motion

for sanctions also is due to be granted . An order consistent with this memorandum opinion shall be entered contemporaneously herewith.

DONE this 14th day of August, 1998.

Lynwood Smith

United States District Judge